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No. 79-1220

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWIN GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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Washington, D.C. 20530

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Petitioner contends that the prosecutor's summation deprived him of a fair trial and that the evidence was insufficient to support his convictions.

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of distributing cocaine and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to three years' imprisonment and a six-year

special parole term on both counts, the sentences to run concurrently.[1] The court of appeals affirmed (Pet. App. 1-3).[2]

The evidence showed that Benjamin Williams, who had been arrested on drug charges, agreed to cooperate with Drug Enforcement Administration agents in the apprehension of his source, Donald McDermott. On April 19, 1979, Williams called McDermott and arranged to purchase one-eighth of a kilogram of cocaine, agreeing to pay him $12,000 for a previously consigned package and the new one (Tr. 35-37, 96-97).

That evening, petitioner and McDermott drove in petitioner's car to the site of the planned transaction, where another vehicle, driven by Shelton Roseborough and containing the requested quantity of cocaine, was waiting. When Williams communicated to McDermott over a beeper system that his arrival would be delayed, petitioner's car left the area. Williams thereafter phoned

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[1]The issue whether a special parole term may be imposed as part of a sentence for a narcotics conspiracy is presently before this Court in *Bifulco* v. *United States*, No. 79-5010, cert. granted, Oct. 9, 1979. Since petitioner received separate six-year special parole terms on the substantive and conspiracy counts, and the terms were ordered to run concurrently, the length of his special parole term will be unaffected by the decision in *Bifulco*. There is accordingly no need for the Court to defer consideration of this petition until *Bifulco* is decided. Moreover, if the Court in *Bifulco* concludes that a special parole term may not be imposed for a narcotics conspiracy conviction, petitioner may move the district court for correction of his sentence pursuant to Rule 35, Fed. R. Crim. P.

[2]The judgment of the court of appeals was entered on January 2, 1980; the petition for a writ of certiorari was not filed until February 7, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court.

McDermott over the beeper system and instructed McDermott to meet him at a nearby gas station, where petitioner's car appeared a short time later (Tr. 39-46, 100-103, 254-258).

Before the transaction could be concluded, Williams learned from a call to his wife that his cooperation with the authorities had just been exposed to McDermott. The surveilling agents immediately observed petitioner's car depart the gas station and pull up next to Roseborough's car; the two cars then drove away (Tr. 46-47, 104, 209-210, 293). The agents pursued the cars, stopped them and placed the occupants under arrest. When McDermott left the passenger seat of petitioner's car, a package of cocaine fell to the ground from inside the car. The agents also found $875 in cash in McDermott's coat pocket. In the back seat of the car they found an attache case belonging to petitioner containing $5,900 in cash and an unloaded pistol; bullets for the gun were found in the pocket of a raincoat also on the back seat. Matching telephone beepers were clipped to both petitioner's and McDermott's belts. Later, $25,000 in $100 bills was found secreted in petitioner's shoes and an additional $3,718 in cash was found in his pocket.[3] In Roseborough's car, agents discovered an eighth of a kilogram of cocaine (Tr. 212-215, 260-262, 280-281, 294).

Following his arrest, petitioner told agents that the money found on his person was his life's savings and that he retained it in his shoes because he did not trust banks

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[3]An additional $18,410 in cash was later found behind a commode in the DEA cell occupied by petitioner and McDermott and another $10,000 was found hidden in the back seat of the DEA car in which they had been transported (Tr. 220, 226).

(Tr. 219, 301). In an interview with an Assistant United States Attorney, he stated that he never went near Roseborough's car that evening (Tr. 302).

2. At one point during his summation the prosecutor, referring to the cash found on petitioner's person, commented (Tr. 392), "If there was evidence, ladies and gentlemen, to demonstrate that this money was legally obtained, don't you think that evidence would have been presented by the defense during the course of the trial?" Petitioner objected and the court admonished the jury (*ibid.*) that "[t]here is no obligation upon a defendant to produce any evidence or do anything." Moments later, the court further instructed the jury (Tr. 394) "to completely disregard those comments of [the prosecutor] with respect to any proof as to the presence of money. I am sure you can do that." Petitioner contends (Pet. 4) that the prosecutor's comment was reversible error.[4]

We note at the outset that petitioner failed to raise this claim in the court of appeals and is therefore precluded from asserting it here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, the claim does not warrant this Court's consideration.

This Court held in *Griffin* v. *California*, 380 U.S. 609 (1965), that the self-incrimination clause prohibited prosecutorial and judicial comment that a defendant's decision not to testify may be evidence of guilt. Here, there was no direct comment on petitioner's failure to testify. The prosecutor's comment was therefore improper only if it was intended to or would naturally and

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[4]Petitioner erroneously states (Pet. 4) that the prosecutor told the jury that "Garcia failed to present any evidence."

necessarily cause the jury to focus on the decision not to testify. See *United States* v. *Cornfeld*, 563 F. 2d 967, 970 (9th Cir. 1977). Where, however, the accused is not the sole potential witness to contradict the government's theory, it is not improper to remind the jury that the defense has failed to explain or to contradict it. *United States* v. *Bubar*, 567 F. 2d 192, 199-200 (2d Cir.), cert. denied, 434 U.S. 872 (1977) (and decisions cited therein). At all events, any prejudice caused by the prosecutor's remark was clearly negated by the court's immediate instruction, which was repeated in its final charge (Tr. 435-436), that a defendant has no duty to call any witnesses or produce any evidence.[5] *Id.* at 200.

3. Petitioner's contention (Pet. 4-5) that the evidence was insufficient to support his convictions is without merit. The evidence established that petitioner, using his own car, drove with McDermott to the site of the prearranged drug transaction. The conduct of petitioner, McDermott and Roseborough at the site followed a pattern commonly employed in drug transactions to prevent "rip-offs" and easy apprehension by law enforcement authorities, by which petitioner and McDermott were to make contact with Williams, collect the cash, and refer Williams to the nearby Roseborough car for receipt of the cocaine. As McDermott's driver and companion, petitioner thus played a vital role in the scheme. This evidence, together with the evidence of the gun and narcotics, the large sum of money found on petitioner's person, the beeper strapped to his belt, and the obviously

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[5] *Berger* v. *United States*, 295 U.S. 78 (1935), is inapposite. There, the misconduct of the prosecutor that was held to require reversal was "pronounced and persistent" (*id.* at 89) and was not sufficiently counteracted by the trial judge.

false exculpatory statements he made following his arrest, overwhelmingly indicated that he was a knowing participant in the planned transaction and that he possessed cocaine with intent to distribute it.[6]

Petitioner argues (Pet. 5) that the jury could not properly infer that he possessed the cocaine from its presence in his car. As undisputed owner and driver of the car, however, petitioner had dominion and control over it and its contents.[7] See *Arellanis* v. *United States*, 302 F. 2d 603 (9th Cir. 1962); *Eason* v. *United States*, 281 F. 2d 818

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[6]Petitioner argues that the cash and gun were not probative of guilt. However, it is well established that large sums of cash are probative of participation in a narcotics enterprise. See *United States* v. *Viserto*, 596 F. 2d 531, 536 (2d Cir. 1979); *United States* v. *Hinton*, 543 F. 2d 1002, 1012-1013 (2d Cir.), cert. denied, 429 U.S. 980 (1976). This is especially true here, where petitioner was present at the site of a contemplated narcotics sale with the cash on his person. Similarly, the jury was entitled to view the seized weapon as one of the "tools of the narcotic trade." See *United States* v. *Viserto*, *supra*, 596 F. 2d at 537.

United States v. *Pantone*, 609 F. 2d 675 (3rd Cir. 1979), is not to the contrary. That case, which did not involve the admissibility of guns and money in a narcotics prosecution, merely held that evidence of other crimes must be relevant to the crime charged. Petitioner's reliance (Pet. 5) on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), is also misplaced, since his possession of guns and cash merely permitted an inference of guilt; it did not require a conclusive presumption or shift the burden in any manner.

[7]In its charge, the district court instructed the jury (Tr. 456-457), without objection, that it could not find that petitioner possessed the cocaine unless it found "beyond a reasonable doubt that [the cocaine] was not in the exclusive actual possession of Donald McDermott at the time the Drug Enforcement Agent stopped the vehicle, and * * * the defendant either had exclusive or joint control over the vehicle itself in which the secreted drug was hidden." Nothing in this instruction served to shift the burden of proof to petitioner in violation of *Sandstrom* v. *Montana*, *supra*.

(9th Cir. 1960). Moreover, the proof at trial supported a finding that petitioner and McDermott had jointly arranged for the delivery of the narcotics and for the collection of cash in return. This relationship warranted the conclusion that they shared joint constructive possession of the cocaine. See *United States* v. *Jones*, 308 F. 2d 26, 30 (2d Cir. 1962) (en banc). In any event, since petitioner received equal and concurrent sentences on the conspiracy and substantive counts, there is no need for the Court to review this claim. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

It is therefore respectfully submitted that petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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